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Attorneys for Defendant Fluent, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

TRENT ALVORD, an individual; ADRIAN
JUCHAU, an individual; MELANIE ALVORD,
an individual; KARISSA KENNEY, an
individual,

Plaintiffs,

vs.

FLUENT INC., a Delaware corporation;
REWARD ZONE USA, LLC, a Delaware
corporation; RYAN SCHULKE, CEO and co-
founder of Fluent, Inc., in his individual
capacity; MATTHEW CONLIN, President and
co-founder of Fluent, Inc., in his individual
capacity; and JOHN DOES 1-20,

Defendants.

**DECLARATION OF DANIEL BARSKY IN
SUPPORT OF DEFENDANTS' MOTION
TO DISMISS UNDER RULE 12(b)(2)**

Judge David B. Barlow

Case No. 2:19-cv-00885-DBB

(ORAL ARGUMENT REQUESTED)

I, Daniel Barsky, having personal knowledge of the matters asserted herein, do hereby declare as follows:

1. I am General Counsel and Chief Compliance Officer for Fluent, Inc.
2. Fluent is a New York-based marketing company. RewardZone USA, LLC is Fluent's wholly-owned subsidiary. Each of the facts alleged herein related to Fluent also relate to RewardZone.
3. Fluent operates advertising-supported promotional and content websites that collect information about consumers, who voluntarily fill out surveys on Fluent's website with purchasing and demographic information.
4. Fluent's websites are promoted by third parties – publishers.
5. Fluent has no connection to Utah. None of Fluent's business activities occur in Utah. Fluent has never been registered to do business in the State of Utah. Fluent has never had any offices, property, assets, telephone listings, or bank accounts in Utah. Fluent does not have any employees, members, or managers in Utah, nor does it recruit employees in Utah. Fluent does not have any sales personnel in Utah and has never marketed or advertised in Utah.
6. Fluent derives less than 1% of total revenue per year from Utah. Fluent derived zero revenue from the text messages at issue in this case.
7. Fluent has not targeted or directed internet-marketing efforts at Utah residents. All of the advertising for Fluent's websites is national and Fluent's publishers do not target any particular state.
8. SMS stands for Short Message Service and is a communication tool that allows users to send brief messages to cellular telephones.

9. SMS messages can be addressed to and from either “long codes” which are the conventional telephone numbers assigned to a particular user, or “short codes” which are 5-6 digit codes owned by or assigned to a business or advertising campaign. An example of a long code is the number 207-477-9750 and an example of a short code is the number 83516.

10. Fluent does not itself send text messages. Fluent does authorize selected publishers to include links to Fluent’s websites in text message campaigns.

11. Fluent keeps careful records of the select publishers authorized to conduct text message campaigns promoting Fluent’s websites.

12. 364 of the text messages at issue are long-code messages. Those messages do not advertise Fluent’s websites and have no connection to Fluent. Neither Fluent nor to Fluent’s knowledge any person engaged by Fluent to promote its websites sent those messages. Fluent did not authorize them. Neither Fluent nor to Fluent’s knowledge any person engaged by Fluent to promote its websites has any record of the sending long-code numbers and Fluent does not know who sent them.

13. Three of the messages, from SMS short code 83516, are messages sent by a third party without Fluent’s knowledge or direction. Fluent did not send those messages nor did Fluent authorize them. They do not advertise Fluent’s websites.

14. Fluent authorized a publisher to send three messages from SMS short code 53294 to 801-787-9750. The publisher then sent a fourth message confirming that the recipient had opted out of receiving messages after the recipient texted “STOP”.

15. Fluent’s records demonstrate that someone consented to receive text messages at phone number 801-787-9750 using a different name than Karissa Kenney. Fluent does not know

if Ms. Kenney consented to receive text messages using a different name or if a third party supplied that phone number.

16. Fluent did not know that Ms. Kenney controlled the 801-787-9750 phone number nor did it know where Ms. Kenney resided when Fluent authorized the messages.

17. Fluent does not know where text-message recipients are located at the time a text message is sent.

18. Starting in 2003, telephone customers can keep their telephone number even when they switch carriers through the federal government's number portability guarantee. And with the demise of long-distance charges for cellular telephones, more and more cellular customers keep their phone number even when they move.

19. Fluent's expertise is in consumer patterns and behavior. Fluent collects data from consumers who voluntarily provide information about themselves, their purchasing desires, and demographic data, including residence. Fluent has a database of over 170 million unique consumers, including information on where consumers reside and their telephone numbers. Fluent knows from experience that a particular area code is not a guarantee of where a cellular telephone customer lives, or even a particularly valuable piece of information for home address. Instead, Fluent knows that telephone numbers travel with consumers.

Signature on following page

I declare under penalty of perjury of the law of the State of Utah and the United States that the foregoing is true and correct.

Executed this 10th day of January, 2020.

/s/ Daniel Barsky
Daniel Barsky

(*I certify that I have the signed original of this document which is available for inspection during normal business hours by the Court or a party to this action.

*Declaration electronically signed, pursuant to U.C.A. § 46-4-201(4) and District Of Utah CM/ECF and E-filing)

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January, 2020, I electronically filed the foregoing DECLARATION OF DANIEL BARSKY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)(2) with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the CM/ECF participants registered to receive service.

/s/ Scott Young

Scott Young